No. 14462

In the

United States Court of Appeals

FOR THE NINTH CIRCUIT

WORCESTER FELT PAD CORPORATION,

Appellant,

v.

TUCSON AIRPORT AUTHORITY,

Appellee.

BRIEF FOR APPELLANT

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SUBJECT INDEX

Table of Authorities Cited

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Jurisdictional Statement

This is an appeal by Worcester Felt Pad Corporation, a Massachusetts corporation, from a judgment of the District Court for the District of Arizona ordered to be entered and filed on December 9, 1953 (Trans. 30). Jurisdiction of the District Court was invoked by reason of the diversity of citizenship of the parties involving an action upon a written lease with the amount in controversy exceeding $200,000.00 (Trans. 9).

Statement of the Case

This is an appeal by plaintiff-appellant from a judgment dismissing plaintiff's Complaint on December 9, 1953 and the Order denying plaintiff's Motion for a New Trial dated March 24, 1954 (Trans. 31-32). The case was tried before the Hon. James A. Walsh and a jury on the 8th and 9th days of December, 1953.

The Action

Plaintiff-appellant leased from defendant-respondent a portion of an airplane hangar situated on the Tucson Municipal Airport in Pima County, Arizona. The lease was for twelve years (Trans. 13-18).

The Federal Government deeded the airport after World War II to the City of Tucson for nothing. There was a recapture clause that if the Government required the property in the event of a national emergency, it could be re-taken on thirty days' notice.

The City of Tucson deeded the property to the defendant-respondent with the same recapture clause.

The lease from the defendant-respondent, Tucson Airport Authority to plaintiff-appellant contained a thirty day cancellation clause in the event if either party was deprived of its use of the leased premises by Government action in the event of a national emergency (Trans. Par. (4) 15-16).

On October 18th, 1951 respondent mailed the appellant a registered letter (Trans. 80-82). Respondent in writing represented: "The Federal Government requires the use of certain covered space on Tucson Municipal Airport which includes all of the space now occupied by you." This representation is false. The letter then undertook to give the thirty day notice to vacate, provided for under the lease.

The appellant relied upon this representation and surrendered the property when the lease still had nine years and seven months to run.

Thereafter plaintiff-appellant discovered respondent's fraud.

Instead of the Federal Government having recaptured the property without payment as it had a right to do, respondent Tucson Airport Authority had negotiated a lease

for appellant's space at $1,400 a month instead of $100 a month, the demised rental.

This despite a clause in the lease which reserved the right to appellant to assign to any other person of adequate financial responsibility.

This suit upon the written lease is for damages sustained by reason of defendant-respondent's fraud. The claim for business losses was withdrawn at the trial. That leaves damages on the lease suffered by appellant which are readily ascertainable. They are merely the difference between $1,400 a month received by respondent concededly and the $100 required by the lease, or $1,300 a month for nine years and seven months, or $149,500. There is evidence in the record by two well-known real estate experts, J. Leslie Hansen of Phoenix, Arizona, and Mark H. Klafter of Tucson, Arizona which fully supports the difference in the rental value even if respondent had not actually received that difference from the Grand Central Aircraft Company, the new lease. (Hansen's testimony of a difference of $1,292 a month, Trans. 94 *et seq.*)), and Mr. Klafter's testimony of 10¢ per square foot per month, or $1,300 a month difference, (Trans. 121 *et seq.*).

The case was fully tried. There was no defense of illegality in the pleadings. At the pre-trial hearing no such defense was suggested or intimated.

Near the close of the case, respondent moved to amend the answer to allege that the lease was void because appellant had not procured a certificate of doing business in the State of Arizona. Respondent's counsel puts it: "As a result of its failure to comply with the statutory provisions for foreign corporations in this state, that its acts done in this state, including the execution of the lease which is the basis of this action, were and are completely void." (Trans. 242).

The Court granted the motion and dismissed on that ground.

The question presented on this appeal:

Is a suit on a lease, valid when made, rendered void by the subsequent doing of business by the lessee?

* * * * *

SPECIFICATION OF POINTS AND ERRORS ON THIS APPEAL

* * * * *

POINT I

The mere signing of a lease in not doing business within the state, any more than the act of owning real estate or any other single act is doing business in the State.

POINT II

The testimony is clear and unchallenged that when appellant acquired the lease it was for investment and not to do business. This testimony respondent does not contradict by any evidence. The fact that appellant thereafter decided to do business in the leased premises did not forfeit appellant's property rights to the lease.

POINT III

Though appellant would be prevented from suing to recover for business done without a foreign corporation license, appellant was not automatically deprived of its property rights, namely the lease, any more than of any other property it owned simply because it subsequently did business in the State of Arizona without a license.

POINT IV

Appellant demanded a trial before a jury. The Trial Court undertook to determine a disputed question of fact by directing the jury to find for the defendant.

ARGUMENT

POINT I

The mere act of signing a lease is not doing business within the State, any more than the act of owning real estate is doing business within the State.

The Arizona statute requiring foreign corporations to fulfil certain requirements to do business in the state is found in Sections 53-801 and 53-802, Arizona Code Annotated, 1939. This law is set out in full below.[1] Although slightly changed through the years with numerous code revisions, in all essentials it is the same today as during Territorial days. On our first main point stated above, there are six Arizona decisions.

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[1] The Arizona statute in effect when the matter arose reads as follows:

"53-801. Requirements to do business in this state—Corporations excepted.—Any foreign corporation, before entering upon, doing, or transacting any business, enterprise, or occupation, in this state shall:

File a certified and authenticated copy of its articles of incorporation or charter with the corporation commission of this state;

Publish its articles of incorporation and file affidavit thereof as required of domestic corporations;

Appoint in writing, over the hand of its president or other chief officer, attested by its secretary, a statutory agent in each county in this state in which such corporation proposes to carry on any business as required of domestic corporations;

Pay a license fee of fifteen dollars ($15.00) to the corporation commission, and obtain from said corporation commission a license to do business in this state.

This section, however, shall not apply to insurance corporations, nor to any foreign corporation, the only business transaction of which, within the state, shall be the loaning of funds to religious, social or benevolent associations, or corporations organized for purposes other than profit.

53-802. Acts void unless statutes complied with.—No foreign corporation shall transact any business in this state until it has complied with the requirements of the preceding section, and every act done by said corporation prior thereto shall be void."

The earliest Arizona case, *Babbitt* v. *Field,* 6 Ariz. 6; 52 P. 775, declared:

> "The doing of a single act of business in the territory by a foreign corporation does not constitute the carrying on of a business within the reasonable construction of the provisions of the chapter relied upon."

This decision cited *Manufacturing Co.* v. *Ferguson,* 113 U. S. 727; 5 C. C. 739; 28 L. ed. 1137, where a similar construction was made.

Martin v. *Banker's Trust,* 18 Ariz. 55; 156 P. 87, the second Arizona case, cited the Babbitt case with approval and said:

> "Obviously the reasonable construction of the Arizona statute is not merely the beginning of any business, enterprise or occupation which renders every act * * * void, but it involves the idea of the pursuit of it, or carrying on the business * * *."

The third case, *Nicolai* v. *Sugarman Iron & Metal Co.,* 23 Ariz. 230; 202 P. 1075, cited the Babbitt case as controlling and once again declared that a single act of business is not under the ban.

The fourth Arizona case, *Monaghan & Murphey Bank* v. *Davis,* 27 Ariz. 532, 234 P. 818, cited the three previous Arizona decisions and said:

> "The consensus of these three cases is that, to come within the statute, a corporation must be engaged in an enterprise of some permanence and durability, and must transact within the state some substantial part of its ordinary business, and not merely a single act."

It is interesting to note that the decision of the lower Court was reversed because of its failure to properly instruct the jury on this point.

The next case, *McKee* v. *Stewart Land & Livestock Co.,* 28 Ariz. 511; 238 P. 326; quoted the Monaghan case just cited with approval and held that amendments made in the law up to and including the 1913 Ariz. Code, did not change this interpretation or prohibit the doing of a single act.

The case of *National Union Indemnity Co.* v. *Bruce,* 44 Ariz. 454, 38 P. (2nd) 648, reviewed the five preceding Arizona decisions on this point as well as two other decisions on closely connected questions and re-stated the same rule holding that minor changes appearing in the 1928 Ariz. Code did not alter the general rule set out in these earlier cases.

If one or two isolated transactions do not constitute doing business (*National Regulator Co.* v. *Abco Boiler Corp.,* (D. C.), 42 F. 2, 712, affd. in the Circuit Court of Appeals, 42 F. 2, 713; *McMillan Process Co.* v. *Brown,* (Cal.), 91 Pac. 2nd 613), one isolated transaction of signing a lease certainly does not constitute doing business (*International Fuel and Iron Corp.* v. *Donner Steel Co.,* 242 N. Y. 224; *Dell* v. *City of New York,* 200 N. Y. Sup. 705; *Gumbinski Bros. Co.* v. *Smalley,* 197 N. Y. 530).

POINT II

The testimony is clear and unchallenged that when appellant acquired the lease it was for investment and not to do business. This testimony respondent does not contradict by any evidence. The fact that appellant thereafter decided to do business in the leased premises did not forfeit appellant's property rights to the lease.

Appellant's president had been in Tucson many times prior to the lease dated March 1st, 1949. He had been coming to Tucson for the past eight years for the winter months (Trans. 212).

He had in mind at the time that this was a terrific deal, a good deal at $100 a month for 13,000 square feet (Trans. 214).

He thought he might use it, the lease, for Tech Toys, a subsidiary of his (Trans. 214). That is why he insisted upon the privilege of subletting his space to suitable tenants (Trans. 215).

It was upon his insistence such a clause was put in the lease. As he testified (Trans. 217): "My thought behind that was here was a lease I was getting at a very low price and it looked to me that there was a good opportunity to sublet it at an advantageous rate to someone else. At first I had in mind Tech Toys. Then I also considered the other factors, possibly people coming into town and wanting space."

He did not make up his mind to go ahead with the manufacturing operation himself until the end of March (Trans. 218). The lease did not require him to pay rent until June 1st, 1949 (Trans. 218).

So the naked question may be thus summarized:

The making of the lease on March 1st was absolutely valid and was not doing business within the state. At the time appellant did not know what he would do with the property. It looked like a good investment and that's why he leased it with the privilege of subletting upon which he insisted.

The courts of other states have had this problem before them and the case of *Wulfing* v. *Armstrong Cork Co.,* (Mo.), 157 S. W. 615, would seem to be in point. In that case the Court said:

> "The obtaining of a desirable contract is sometimes an inducement for a foreign corporation to come into the state; it is not bound to establish itself here before it can obtain such a contract. Entering into

> a contract like the one in question undoubtedly is 'transacting business' within the unlimited meaning of the term; but that is not the sense in which the term is used in the statute just quoted. As there used, it means the carrying on the work for which the corporation was organized—"

Considering the number of times it has been cited by other courts, the case of *General Conference of Free Baptists* v. *Berkey* (Cal.), 105 P. 411, would seem to be a leading case and in that decision, the Supreme Court of California said:

> "There have been many decisions construing the words 'doing business' under such statutes, and the cases are not in harmony. In most jurisdictions it is held that such statutes have reference to a continuation in some form of business, and do not apply where a foreign corporation does a single act of business within the state. 3, Clark & Marshall on Private Corporations, Sec. 846, and cases cited. There are decisions, however, which hold that a foreign corporation may come within the purview of such statutes by the doing of a single act. See, for example, Farrior v. Security Co. 88 Ala. 275, 7 South 200. But even in the states which announce this doctrine it is held that the single act which will bring the corporation within the purview of the statute must be an act of the ordinary business of the corporation. * * * This corporation was certainly not engaged in the buying and selling of land * * *. A distinction is to be drawn between the purposes of a corporation and its powers * * *. The purchase and sale of property by such a corporation is not one of the ends for which it is organized, but is merely a means to enable it to accomplish those ends."

The general principle established by the cited cases is summarized by the text writers as follows:

"Where a foreign corporation has not engaged in its general business in the state, but has done only those acts which are preliminary to the doing of the business for which it was incorporated, such acts will not be regarded as the doing of business in the state."

Fletcher Cyc. Corps. Permanent Ed. Vol. 17 Sec. 8468 pp. 475-8 and cases cited.

A similar statement of the general law will be found in 20 C. J. S. "Corporations" Sections 1831-2 pages 50-51 and in 14A C. J. "Corporations" Sections 3986-3989, pages 1279-1280.

Although Alabama's Supreme Court has been classified by text writers as following the "strict" line in interpreting its statutory ban on "engaging or transacting any business" by a foreign corporation, it is interesting to note that the case that perhaps comes closest to our exact fact situation was decided by that court in conformity with appellant's contentions. The case of *Friedlander Bros.* v. *Deal,* 118 So. 509, holds that a foreign mercantile corporation in leasing a store building in that state in order that it might thereafter engage in its ordinary business was not in violation of the law of Alabama and its lease was not invalid although it never did comply with the law of that state. Since it is clearly in point, Appellant earnestly urges this Court to read that opinion in full.

Although concerning a deed, rather than a lease, another California case seems to clearly demonstrate the true rule. In *Davies* v. *Mt. Gaines Min. & Mill. Co.,* 286 P. 740, the plaintiff sued to set aside a deed because the defendant, a foreign corporation, had not complied with the California law before acquiring the property. In support of this contention, a number of Wisconsin cases were cited, based upon that state's statute

"'* * * which reads as follows: 'No foreign corporation shall transact business or acquire hold or dispose

of property in this state unless it shall have first complied with the requirements of the statute', etc., St. Wis. 1927, Sec. 226.02. To this the respondent interposes the unanswerable argument that the Corporation Act of the State of California does not and has not, since 1921 (St. 1921, p. 638), required the filing of certified copies of its articles of incorporation, or other papers, prior to the acquiring or conveying of real estate in California."

Appellant here points out that Arizona has never imposed this requirement and the last cited case seems clearly in point.

POINT III

Though appellant would be prevented from suing to recover for business done without a foreign corporation license, appellant was not automatically deprived of its property rights, namely the lease, any more than of any other property it owned simply because it subsequently did business in Arizona without a license.

It has been long settled that valid contracts are property and as such are protected under the Constitution; *Lynch* v. *United States,* 292 U. S. 571, 78 L. ed. 1434, 54 S. Ct. 840 and corporations have the same property rights as individuals *Pierce* v. *Society of Sisters,* 268 U. S. 510; 69 L. ed. 1070; 45 S. Ct. 571; 39 A. L. R. 468. The plaintiff then owned a lease which was a valid and valuable piece of property when acquired.

Under the law of Arizona, the rights of a tenant under a lease are recognized and protected by the courts like any other property right. See:

Genardini v. *Kline,* 19 Ariz. 558; 173 P. 882;
Woodward v. *Fox West Coast Theatres,* 36 Ariz. 251; 284 F. 350;

Karam & Sons Mercantile Co. v. *Serrano,* 51 Ariz. 397; 77 P. (2nd) 447;
Jamison v. *Franklin Life Ins. Co.,* 60 Ariz. 308; 136 P. (2nd) 265.

It would appear clear from the points already made that the appellant acquired control of a valuable piece of real estate in a valid and lawful manner, and thereafter did business there invalidly. Should that take from him his right to the ownership of this property? Could anyone take it from appellant without recompense? Is it not more reasonable to say that the later illegality of its acts and its business makes an action concerned with that business unenforceable?

"It is a well established principle of statutory construction that penal statutes must be strictly construed in determining the liability of the person upon whom the penalty is imposed, and that the more severe the penalty, and the more disastrous the consequence to the person subjected to the provisions of the statute, the more rigid will be the construction of its provisions in favor of such person and against the enforcement of such law." Suth. Stat. Const. Sec. 322; Potters Dwarris, 244.

Missouri, K. & T. R. Co. of Texas v. *State,* 100 Tex. 420; 100 S. W. 766 (p. 767).[2]

Forfeitures are not favored, and they should be enforced only when within both letter and spirit of the law.

"Forfeitures" Key No. 1, Am. Digest System and cases cited thereunder.

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[2] See also:

State v. *Blaisdell* (Me.), 105 Atl. 359;
Denver & R. G. R. Co. v. *Frederick* (Colo.), 140 P. 463;
Boott Mills v. *Boston & M. R. R.* (Mass.), 106 N. W. 680;
Clymer v. *Zane* (Ohio), 93 A. L. R. 1245;
Kitts v. *Kitts* (Tenn.), 189 S. W. 375.

On that one question, Appellant by assigning the lease, as he had the right to do, did not have to continue doing business or indeed ever begin doing business in the State. He was entitled to the rent the sub-tenant paid, namely $1,400 a month, for the balance of the nine year seven month period.

Perhaps it can be stated in another way.

While appellant could not risk doing business in the State, without perhaps being unable to recover on those business transactions, there was nothing in the world that prevented him from gaining the advantage of his solemn contract. That required no doing of business. That contract gave him the privilege of sub-letting and the increased rental was his, not the landlord's.

That advantage could not be summarily pirated by the landlord on the theory that he was doing business. It required no doing of business to assign or sublet, as this lease gave lessee the right to do.

Profiting by the difference under his contract as a reward for his foresight in making this advisable investment is legally proper.

If appellant had sub-leased or assigned its lease to Teck-Toys as appellant's President testified he considered doing when he acquired the lease, the law seems clear appellant would not have been doing business in Arizona.

See:

Linton v. *Erie Ozark Min. Co.* (Ark.), 227 S. W. 411;
Wilson v. *Peace* (Tex.), 85 S. W. 31;
Missouri Coal & Min. Co. v. *Ladd* (Mo.), 61 S. W. 191.

The proposition may be stated in another way. A lease when made is valid. The doing business under the lease is invalid. The lessee has a change of heart, a *locus*

poenitentiae and regrets the unlicensed doing of business. Does that forfeit his lease? Or, has he a right to stop doing business and assign his lease where the lease provisions give him that right?

Suppose in New York State I run my automobile on February 2nd, 1954 on the 1953 license which expired February 1st. I realize a policeman may serve me with a summons for a penal offense, *malum prohibita,* not *malum in se.*

Does that mean the policeman can steal my car because I drove it unlicensed one hour? Does it also mean that I have no right to correct my inadvertent error? May I not procure a 1954 license for the car and drive it on February 3rd, and thereafter?

Here there is an act of inadvertence and not moral turpitude. (They thought when they paid a sales tax to the State of Arizona they were permitted to do business. They had no legal advice.) They failed to file a license and did business.

They discovered it in 1951 and gave up doing business. In other words, they no longer drove the car.

Does that mean Tucson Airport Authority could appropriate the car on the ground that its use having been illegal theretofore, it was void *ab initio* and continuously thereafter?

Is the lower Court right when it holds that the lease was void at its inception because when signed the lessee was not licensed? Was the signing an act of doing business which rendered the lease void forever?

That would lead to so many forfeitures that there would be no place of repentence for the honest, mistaken citizen. He would be pilloried the rest of his life for an innocent error, no matter what attempts he made to correct and do penance therefor.

Another illustration: Appellant took a valid lease. His occupancy during two and a half years of the 12 year term was in the eyes of the law void, unenforceable and illegal. In other words, the void use of the premises may be treated as though appellant did not use the premises at all.

Is the appellant still not entitled to the benefit of his bargain on a substantial property right involving the onwership of real estate, namely, the last nine and a half years of demised term, especially in view of the appellant's foresight in obtaining a lease provision that it had the right to assign or sublet, and that the landlord must accept a financially satisfactory tenant.

Grand Central Aircraft was most satisfactory to the landlord financially because landlord accepted it as a tenant paying $1,400 a month for appellant's demised space, only respondent kept to itself the $1,300 a month difference instead of giving it to appellant entitled to it by reason of its property rights under the lease.

The question would be less doubtful of determination if respondent in attempting to oust appellant had assigned as its reason the fact that appellant was doing business without license. Even then there is grave doubt whether had the ouster been on that claim appellant would not still have retained its vested property right in the nine year and seven months' balance of the term of the lease.

But that's not the instant question. Here respondent never ousted appellant for the void business conduct. Instead it relied upon a fraudulent mis-representation as a result of which it obtained appellant's removal. Only much later did appellant discover the fraud of respondent and that the Government had not taken the property.

Upon the familiar principle that if one rejects the delivery of goods upon an assigned reason namely shortage, one cannot thereafter defend upon the ground that the

goods were imperfect merchandise anyhow. One stands or falls upon the claim assigned.

In the instant case respondent must fall because the misrepresentation was in writing and the fraud was ample proof through respondent's own admissions.

That the respondent gained an unholy profit to the extent of $145,000 for the balance of the term by reason of its written fraudulent misrepresentation does not give any greater rights than the ground upon which it stood and which it assigned as its reason for cancelling the lease.

Now that the ground has fallen away from under respondent, it is too late to urge another ground which in any event we have shown above applies only to the term when the premises were illegally used and does not forfeit the balance of the term of nine years and seven months for which appellant had the forethought to provide that he was entitled to assign to any financially satisfactory tenant and reap the benefit on that assignment of his bargain.

The lower court erred because it failed to separate and distinguish between two property rights of appellant. One was the property right appellant possessed to do business. In that property right as an incidental to doing business he occupied leased premises. That property right appellant lost because it failed to file as a foreign corporation within the statute, and all its rights of doing business were rendered unenforceable by the penal statute of Arizona.

The appellant had another vested property right which the lower court entirely overlooked. That vested property right, a lease with nine and a half years to go, with a right of assignment whereby landlord was compelled to take any tenant of satisfactory financial means, was not affected by the loss of appellant's other property right. That lease was valid from its inception. When appellant ceased manufacturing, it could not restore its right to enforcement of contracts or rights arising out of its doing

business in the State of Arizona, but the lease, the vested property right of twelve years' demised possession, with the right of assignment to which landlord could not object, continued in full force and effect. If anything it continued more strongly in full force and effect when appellant ceased doing business in the State. That right, the ownership of real estate, was not forfeited.

The rights under the lease belonged to the appellant. Respondent could not deprive appellant of the $1,300 a month difference in rental value on the ground that for two and a half years under a twelve year lease appellant had illegally done business. That is surely true when no such claim is made as the reason for the ouster. Respondent defrauded appellant into giving up of nine and a half years of a twelve year term by making appellant believe that the government had taken over the property under its recapture clause. Instead, respondent was merely arrogating to itself $1,300 difference in rental value, knowing all the time that Grand Central would pay $1,300 a month more for appellant's space and profiting by its own fraud, to the extent of one hundred forty odd thousand dollars over the nine and a half year term.

When the two separate property rights are considered in that light, it would seem clear that though appellant forfeited the right to enforcement of its business contracts by doing business without a license in Arizona for two and a half years, it did not forfeit its twelve year lease incidentally used in doing such business. If there was any such intent in the penal statute of Arizona it would certainly be more clearly expressed.

That vested property right under the Constitution could not be taken away from appellant without due process even if appellant were an alien, instead of a citizen of another State who had inadvertently failed to file to do business. Though the Court would not lift a finger to help

appellant to enforce any business contract while doing business in Arizona, the Court should be just as astute to protect appellant in his vested property right to the lease taken as an investment, used for two and a half years without license (during which respondent, of course, promptly received rent as due) and still a vested nine and a half year unexpired term of property appellant had the right to assign or sublet. That respondent should sublet it at $1,300 a month more for the unexpired period of appellant's term and deprive appellant of its profit by foisting a fraudulent scheme upon appellant only makes the argument in appellant's favor more unanswerable.

To interpret the Arizona statute as done by the Trial Court would make the law unconstitutional since it would take from the appellant foreign corporation, as a nonresident citizen, its property without due process of law and deny it the same rights, immunities and privileges that are accorded to citizens of Arizona, and finally would deny such foreign corporation the equal protection of the law.

> "In applying these constitutional and statutory provisions regulating the doing of business in the state by foreign corporations it is important to keep in view the fact that they are prohibitory in character and should not be extended by interpretation beyond their plain terms."
>
> Fletcher Cyclopedia Corporations Permanent ed. Vol. 17; Sec. 8464 p. 468.

The defendant-respondent was put on notice that the appellant-lessee was buying the lease only as an investment and not necessarily to operate. Paragraph "8th" of the lease says: "It is understood and agreed that the lessee plans on assigning a portion or all of this lease to one or more other corporations."

And, of course, further: "Lessor agrees to approve any such assignment or subletting providing that the said sub-

lessee or tenant is reasonably satisfactory to said lessor." (Par. 8).

So, if the premises were taken with that understanding, let us assume that the first three years of the lease the premises were vacant and landlord still received the rent from the tenant. The void occupancy (illegality in failing to file in the State) may be considered the same as a vacancy.

Could the landlord, if the premises were vacant for the first three years, still having received his monthly rental, successfully say that the tenant had lost the right to the other 9 years of the lease in view of the recitals in Paragraph 8th and the binding stipulation that the landlord had to accept a satisfactory assignee or sub-lessee?

The landlord did accept what it knew was a satisfactory assignee or sublessee of the premises in Grand Central Aircraft Corporation but it took for itself the $1,300 a month difference between the amount stipulated with appellant and the amount Grand Central was paying and still pays, that the difference belongs to appellant, not respondent, by forfeiture.

Here is another example: (I hope I am not worrying the Court with my parallel suits, but I know of no other way to establish my argument completely.)

Suppose I bought a piece of real estate in Arizona and erected a factory on it. I operated three years without a license and then belatedly procured a foreign corporation right to do business permit. Could the State of Arizona, to whom I paid all my taxes on the real estate (appellant paid all the rent on his real property, a lease for more than three years, namely 12 years) successfully claim that I had forfeited my real property? Could any trespasser walk in and take it away because I had operated without a license?

The statute prescribes the penalty. All acts done are void and unenforceable, but the acquisition of the real property was legal when made. Is there anything in the statute that says it became forfeit?

And if there is, is there no *locus poenitentiae* (May not a wrong-doer, not *malum in se* but *malum prohibitum* have a change of heart and comply with the statute, whether his previous failure was purposeful or inadvertent?)

No reading of the statute can render a real property right valid when acquired, void and forfeit by reason of unlicensed acts of aliens or foreign corporations.

The situation may be even more clarified by supposing that I erected a liquor store on real property in Arizona and ran it without a license. Could I, thereafter, demolish the store and still own the vacant land? Is there anything in the statute that says that the land became forfeit because the use of the land was without permission? It would require reading into a penal statute, which must be strictly construed, penalties never intended by the codifiers.

POINT IV

Appellant demanded a trial by jury. The Trial Court undertook to determine a disputed question of fact by directing the jury to find for the defendant.

It has long been settled law that under general principles of comity, and in the absence of positive direction to the contrary, corporations created in one state are permitted to acquire, hold and convey property in another state equally as may individuals.

Cowell v. *Colorado Springs Co.,* 100 U. S. 55; 25 L. ed. 547;
Christian Union v. *Yount,* 11 Ott. 352; 25 L. ed. 888; 101 U. S. 352.

A person seeking to avoid a transaction with a foreign corporation on the ground of non-compliance has the burden of showing a general course of dealing.

> *Monaghan & Murphey Bank* v. *Davis,* 27 Ariz. 532, 234 P. 818.

> "If the facts relating to the doing of business are undisputed and the inference to be drawn from them is so obvious as to leave no issue for the jury, the question is one of law for the court; but where the evidence upon the point is conflicting so that reasonable minds might draw different conclusions therefrom, it is for the jury under proper instructions from the Court."

> Fletcher, Cyclopedia, Corporations, Permanent Edition, Vol. 17, Sec. 8502, note 54 and cases cited.

The case of *Lake Superior Piling Co.* v. *Stevens* (La.), 25 So. (2nd) 120 is in point on this angle of the case. In that decision the court held that the question of whether a foreign corporation's ownership of property in that state was "doing business" could not be answered without a finding of the facts, which the trial court failed to make, and hence the case was reversed for that reason. See also:

> *Davis-Wood Lumber* v. *Ladner* (Miss.), 50 So. (2nd) 615.

In our case the trial court apparently considered that this was not a question of fact, that the burden was upon the plaintiff to prove compliance with the state law, or that the fact situation was undisputed. The mere consideration of these alternatives makes the error more glaring.

If every other contention made by Appellant in this brief were wrong, still the case must be reversed for this

fundamental error under which the court usurped the province of the jury and undertook to try and decide this fundamental fact situation. That error was and is fatal to the validity of the judgment appealed from.

Respectfully submitted,

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